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SUPREME COURT OF THE UNITED STATES

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In the Matter of the Petition of

DONG WING OTT and

DONG WING HAN

For A Writ of Certiorari To The United States Court of Appeals For the Second Circuit

-against-

EDWARD J. SHAUGHNESSY, District Director, Immigration and Naturalization Service, New York District,

Respondent.

- -x

MOTION TO DISPENSE WITH PRINTING OF PETITION FOR WRIT OF CERTIORARI NO. 144

The petitioners respectfully move this Court for leave to file typewritten copies of the attached petition for a writ of certiorari. The reason for this application is that the petitioners are unable to pay printing costs. They were both detained in the custody of the Immigration and Naturalization Service from April 25, 1952 until October 1954; and since then have only occasionally been employed in low paying jobs in the restaurant field, from which their earnings are barely sufficient to provide them with shelter, food and clothing. Neither petitioner has any savings whatsoever. The family of the petitioners is financially unable to assist them. They would move for leave to proceed in this Court in forma pauperis but for the fact that they have been advised that since they have, up to now, been held not to be citizens of the United States, they are not permitted to proceed in this fashion. They have borrowed the sum of

$100.00 to pay the docket fee for this writ. They respectfully request this Court to consider the allegations of the accompanying petition for a writ of certiorari as a part of this motion so that the Court may see the merit thereof.

Respectfully submitted,

DONG WING OTT

DONG WING HAN

Petitioners Pro Se
478 Vanderbilt Street
Brooklyn, New York

Dated: Brooklyn, New York
June 9, 1955

SUPREME COURT OF THE UNITED STATES

- -x

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tion Service, New York District,

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The petition of DONG WING OTT and DONG WING HAN respectfully shows to this Court and alleges:

FIRST: The opinion of the United States Court of Appeals for the Second Circuit is reported in 220 F. (2d) 537. There was no opinion written by the District Judge.

SECOND: The order sought to be reviewed was made and entered March 15, 1955. An order was made denying a petition for rehearing on April 13, 1955.

THIRD: Jurisdiction to review in the manner sought herein is granted this Court by 28 U.S.C. Sect. 1254 (1).

FOURTH: The questions presented for review are as follows:

(a) Whether, in an administrative exclusion proceeding affecting an applicant for admission to the

United States as a United States citizen who derived his citizenship through birth abroad to a United States citizen father, the applicant was denied due process of law under the Fifth Amendment by being compelled to submit to an extraction of blood for blood typing tests on the question of paternity; and whether such procedure also violated his protection against unreasonable searches and seizures under the Fourth Amendment, there having been no application for permission to extract the blood made to any court.

(b) Whether the use of such blood typing procedure denied due process of law when contention was made, some evidence thereof offered, and no government evidence in rebuttal offered, that this procedure was applied by the government only to claimants to American citizenship of Chinese origin, and not to similar claimants of other racial origin.

(c) Whether due process of law was denied by holding that a greater need exists for the government to apply such procedure to American citizen claimants of Chinese origin than to American citizen claimants of non-Chinese origin, where no evidence exists in the record to show wherein such need for discrimination exists, the holding being presumably based on alleged administrative knowledge of the state of vital statistics in China.

(d) Whether due process of law was denied claimants in refusing them an opportunity, requested at the hearings, to show such discrimination by examination of government officers and designated immigration files, and the

government, with knowledge of the existence or non-existence of the discrimination, offering no evidence to rebut the claim.

(e) Whether, consistent with the requirement of due process of law under the Fifth Amendment, the United States Immigration and Naturalization Service may accept as conclusiveness of non-paternity in an exclusion proceeding affecting a person claiming United States citizenship as the foreign born son of a United States citizen father, the results of blood typing tests, in the face of testimony establishing paternity to a degree normally and customarily sufficient in the absence of blood typing tests, where the result of giving conclusive effect to such blood typing tests is to find a person not to be a citizen of the United States who otherwise might be held to be such.

(f) Whether due process of law was denied a claimant to United States citizenship in an exclusion proceeding, by a ruling of the Immigration and Naturalization Service that it was bound by the results of such tests, and could not give weight to oral contradictory evidence.

(g) Whether due process of law was denied such claimant in holding that he voluntarily submitted to blood testing when the evidence was, that although he made no objection to the taking of his blood for testing, he was at the time in physical custody of immigration authorities at Ellis Island, New York Harbor, and was neither informed nor did he know of the purpose of the extraction of his blood, which was performed in a hospital, the claimant being unable to understand and speak the English language.

(h) Whether due process of law was denied such claimant in holding that, where only a report of the blood typing results was introduced into evidence by the government, the claimant lost his right to examine the technician who performed the tests by (1) not objecting to the admission of the report in evidence at its first offer by the government, even where it appears that it was offered then as a physician's report and only later was it shown to be a report of a mere technician, and (2) by not renewing a demand for the production of the technician, made at the final hearing, even though the record shows that counsel for the claimant demanded his production at said hearing, stated to the hearing officer that he desired his production at the conclusion of certain other testimony, asked the hearing officer to remind him if he should forget, and then did forget to renew the demand when the pending testimony was concluded and the hearing officer did not remind him. The examination of the testing technician was designed to show his qualifications to perform this testing, and the techniques and procedures he used, there being evidence by the government's own expert witness that not all persons were qualified to perform the tests, that the particular government technician could not have been qualified to perform certain of the blood typing tests performed by him and that errors in technique and procedure could occur which would result in erroneous results.

(i) Whether due process of law was denied in inferring that the same blood typing results would recur if claimants were re-tested, from the fact that counsel

for claimants declined, on constitutional grounds, to permit claimants to be re-tested.

(j) Whether due process of law was denied in finding claimants not to be United States citizens solely on the basis of a typewritten paper signed by a United States Public Health Service officer who admitted he had no personal knowledge of its accuracy, which was typed and handed to him by an unidentified stenographer who was supposed to have typed it from the handwritten notes of a named laboratory technician whose testimony was never taken, there being no evidence on record either of the accuracy of the typewritten transcription or of the qualifications of or techniques and procedures used by the technician. Contention is made that this piece of paper did not constitute substantive evidence of sufficient weight to sustain a finding of non-paternity.

FIFTH: Revised Statutes of the United States (1878) Section 1993:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Constitution of the United States; Fifth Amendment:

> "....nor shall any person....be deprived of life, liberty or property without due process of law...."

Constitution of the United States; Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, andno Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

SIXTH: The material facts in the case are as follows: The petitioners were born in China, and claim United States citizenship as the sons of Dong How Lung, a native born United States citizen. They arrived at the Port of New York on April 25, 1952, by plane from Hong Kong. They were held for a hearing by a Board of Special Inquiry, and ordered excluded as aliens not in possession of immigration visas, this excluding decision being affirmed by the Board of Immigration Appeals. In its original decision, the Board of Special Inquiry found that the testimony of all parties was of a character which would ordinarily be given sufficient weight to cause their admission to the United States as United States citizens; but that the results of blood-grouping tests, conducted by a technician of the United States Public Health Service, excluded the possibility that the petitionerswere children of the claimed parents, and on the basis of said test results, petitioners were found not to be children of the claimed father, and therefore not to be citizens of the UnitedStates. Several reopened hearings were held. At one of the repened hearings, it developed that a new blood test, privately taken of the claimed mother, showed a different result from that previously reported; and on the basis of the new report, it became possible, using the test evidence and theory, for Dong Wing Ott to be the child of the

claimed parents; but since one of the tests still showed incompatibility of blood types between the other petitioner, Dong Wing Han, and the claimed parents, and since all parties claimed that Dong Wing Ott was a brother of Dong Wing Han, Dong Wing Ott continued to be excluded by the Board of Immigration Appeals.

The American citizenship of the claimed father is conceded by the Immigration and Naturalization Service. If the petitioners are the legitimate children of the claimed father, they would be citizens of the United States under Section 1993 of the Revised Statutes. No question has been raised as to the validity of the marriage of the claimed father with the claimed mother, who is lawfully in the United States as a permanent resident. The sole issue before the administrative agency was whether or not the petitioners are the children, as claimed, of the American father. The blood testing procedure was instituted by the Immigration & Naturalization Service very shortly before the petitioners arrived in the United States. Claim has been made that this procedure was imposed exclusively upon claimants to American citizenship of Chinese origin. The Court of Appeals for the Second Circuit has stated that even if this were so, the discrimination was based upon a reasonable ground, to wit, the lack of vital statistics in China. The record, however, contains no evidence on the question of the state of vital statistics in China.

The blood tests were administered by a technician of the United States Public Health Service, at a time

when the petitioners were in custody. The record shows that they were told to accompany immigration officers from Ellis Island to the Marine Hospital, and made no objection to doing so. This has been held to show a voluntary acquiescence in the blood testing; but their testimony at a hearing was that they were not told and did not know why they were being brought from Ellis Island to the Marine Hospital. This was the first time the petitioners had been in the United States; and they could neither speak nor understand the English language. Counsel for the petitioners was held to have consented to the introduction into evidence of the blood test reports; but the record shows they were introduced as reports of a physician of the United States Public Health Service, and only subsequently was it known to counsel and disclosed at the hearing that the physician who signed the reports merely endorsed the reports as typed by a secretary from a handwritten series of notations made by the technician, and the physician had no actual knowledge of what had been done in the case. The petitioners through counsel, declined an offer to have new blood tests conducted and the inference has been drawn from such declination that the results would be equally adverse; but the record shows that counsel repeatedly declined such offers on constitutional grounds, believing that the application of such blood testing procedures exclusively to persons of Chinese origin denied the petitioners due process of law to which they were entitled: that the use of blood testing procedures on American citizen claimants of Chinese origin only, imposed upon them as a burden and measure of proof greater than that imposed upon American citizen claimants of other national origin.

Counsel for petitioners asked for the production of the laboratory technician of the United States Public Health Service who had made the tests, in order to examine him as to his qualifications and testing techniques, it being conceded by the Government's expert witness that errors could occur; and when counsel was asked by the hearing officer to reserve this matter until completion of pending cross examination of another witness, counsel said that he hoped, if he forgot to renew the request, that the officer would remind him. The hearing was closed with counsel having forgotten to renew the request to produce the technician, and without his having been reminded by the officer conducting the hearing. Claim is made by the government that this constituted a waiver of the right to demand the production of the testing technician.

At Several of the hearings, counsel for petitioners requested certain government officials to testify on the question of discrimination against American citizen claimants of Chinese origin, and requested the production of specified government files which, counsel contended, would show the existence of such discrimination. All these requests were denied. Thereafter the government contended that petitioners had not met the burden of proving the existence of such discrimination. Petitioners contend that the existence of a nationwide governmental policy of discrimination can only be shown in the manner sought, since only the officials administering the program were in a position to know how it was being administered. One of the exhibits in the case was a government document showing that the United States Public Health

Service was being asked to test persons of Chinese origin and was not being asked to test persons of any other racial origin.

The petitioners were in custody of the Immigration and Naturalization Service from the day of their arrival on April 25, 1952, until their release under administrative bond in October 1954, which release was for the benefit of the Service when the detention facilities at Ellis Island, New York Harbor, were closed down.

SEVENTH: The basis for Federal jurisdiction is, that the petitioners were in custody of Federal Immigration authorities pursuant to a procedure whereby persons seeking to enter the United States are required to be inspected and admitted by such authorities. Application for the writ of habeas corpus was made on the ground that such detention was illegal because the petitioners were not accorded due process of law by the detaining authorities.

EIGHTH: The allowance of the writ of certiorari is sought to be justified on the following grounds:

(a) The position of the Immigration and Naturalization Service as sustained by the Court of Appeals for the Second Circuit on the conclusiveness of blood test results to exclude the possibility of paternity, is in conflict with the position taken by the Court of Appeals for the Seventh Circuit in Lee Wing Hong v Dulles, 214 F. (2d) 753, wherein the Court said "...however valuable or important such testimony may be, we know of no rule which makes it conclusive."

(b) Allowing the decision sought to be reviewed to stand, would permit the Immigration and Naturalization Service to apply different rules of evidence and standards of proof to persons of Chinese origin who assert claim to United States citizenship than to persons of any other racial origin. The Court of Appeals has justified this discrimination by taking notice of an alleged lack of vital statistics in China as compared with other countries in the world, despite that there is no evidence in the record to show whether or not in fact this alleged condition exists, or, if it does, whether it is unique to China and sufficient to justify the application of different burdens of proof to persons born in China.

(c) To allow the decision to stand would allow the Immigration and Naturalization Service in all cases to take blood tests without advising persons involved that the procedure of holding out one's hand would lead to an extraction of blood, a testing of such blood, and the putting into evidence against such persons of the results of such tests. It would justify and permit the involuntary furnishing of evidence through ignorance on the part of the affected person, which is just as wrongful a method of obtaining evidence as through the use of force or fear.

(d) Allowing the decision to stand would permit the rule to be established that a fundamental part of a case, equivalent to the corpus delicti in other types of cases, could be established through the introduction into evidence of a hearsay report, without affording an opportunity to the person affected to test the validity of the

evidence. In the blood test result put into the record by the administrative agency in this case, fundamental error could exist if the technique of the testing technician was inaccurate, if the material used was not effective, if there was confusion in the arrangement of the specimens, if there was an error in the typing of the result by the stenographer from the handwritten notes of the technician, etc. The mere error in transcription of one letter of the alphabet produces a difference between exclusion or non-exclusion of parentage.

(e) Allowing the decision to stand would permit the principle to be adopted by the Immigration and Naturalization Service that the declination of a person to be blood tested necessarily compels the inference of the conclusion that the report of such testing would be adverse to him, notwithstanding that the declination was made on the constitutional ground that the person was being discriminated against by compelling his testing where others of the same class were not required to submit to such tests.

(f) There are large numbers of persons who claim American citizenship by birth abroad to American citizen fathers, who are of Chinese origin. The existence of discriminatory procedures affects a large class of American citizens, including the fathers who seek to have the citizenship of their children recognized. Allegation is made that throughout the United States the Immigration and Naturalization Service uniformly enforces a discriminatory procedure of proof on persons of Chinese origin. The instant Court of Appeals decision will be used by the administrative agency to justify its practice in all pending and in all

future cases. Review is therefore sought on the grounds that the issues involved affect large numbers of persons of Chinese origin in the exercise of their rights as American citizens.

Respectfully submitted,

DONG WING OTT

DONG WING HAN

Petitioners Pro Se
473 Vanderbilt St.
Brooklyn, New York

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NOS. 183, 184 October Term, 1954

Argued February 9, 1955 Decided March 15, 1955

Docket Nos. 23307, 23308

UNITED STATES OF AMERICA, ex rel.
DONG WING OTT,

Appellant,

v.

EDWARD J. SHAUGHNESSY, District
Director of the New York
District of the Immigration
and Naturalization Service,
or such other person, if any,
as may have in custody one
DONG WING OTT,

Respondent.

UNITED STATES OF AMERICA, ex rel.
DONG WING HAN,

Appellant,

v.

EDWARD J. SHAUGHNESSY, District
Director of the New York
District of the Immigration
and Naturalization Service,
or such other person, if any,
as may have in custody one
DONG WING HAN,

Respondent.

Before CLARK, Chief Judge, HINCKS, Circuit Judge, and SMITH, District Judge.

Appeals from the United States District Court for the Southern District of New York. Murphy, Judge.

Dong Wing Ott and Dong Wing Han appeal from orders of the United States District Court for the Southern District of New York dismissing writs of habeas corpus brought to test the legality of relators' detention by the Immigration Service as deportable non-citizens.

Elmer Fried, New York City, for appellants.

J. Edward Lumbard, United States Attorney for the Southern District of New York (Matthew A. Campbell and Harold J. Raby, Assistant U.S. Attorneys and Lester Friedman, Attorney, Immigration and Naturalization Service, of counsel), for respondent.

SMITH, District Judge:

Relators, foreign born Chinese who sought admission to the United States pursuant to Section 1993 Revised Statutes as sons of a native American citizen father and a legally resident alien mother, appeal from an order of the District Court for the Southern District of New York dismissing writs of habeas Corpus issued on their behalf to test the validity of the administration determination, affirmed on appeal to the Board of Immigration Appeals, that their claims to citizenship were not established, and to test the validity of the order for their deportation.

Relators had applied for admission to the United States and hearings were held at Ellis Island July 15 and 22, 1952 before a Board of Special Inquiry. The applicants were represented by counsel. The answers to the usual questioning of the applicants and their witnesses as to family history and background in China were consistent and had they been relied upon by the Board it would have found the claimed relationship satisfactorily established.

However, the Board received in evidence without objection reports of the U.S. Public Health Service purporting to show ABO blood grouping and MN blood typing results of blood taken from applicants and their claimed parents. There was also received in evidence a pamphlet by Dr. Wiener, entitled Blood Grouping Tests in the New York Courts, reprinted from United States Law Review, December 1936, containing tables from which, together with the blood test reports, the Board found that neither applicant could be a son of the claimed parents.

The blood test reports having been signed by Dr. Cameron, of the U.S. Public Health Service, the Board of Immigration Appeals ordered the hearings reopened so that he might be questioned. He appeared and testified on the methods employed at his laboratory, that the tests had been made by a technician named Monica, qualified to take the tests, and that Dr. Cameron was not qualified as an expert in genetics to interpret the tests for their bearing on the issue of heredity.

The Board on April 22, 1953, adhered to its earlier ruling.

Appeal from this decision was dismissed by the Board of Immigration Appeals on July 31, 1953.

Writ of habeas corpus was issued by one of the judges of the District Court for the Southern District of New York, September 14, 1953.

The District Court, Murphy, D.J., on December 11, 1953, ruled that giving conclusive effect to a learned treatise on the question of paternity over direct and competent

evidence to the contrary, without producing the author or some similar expert, although conveniently available, was error sufficient to sustain the writ unless the hearing should be reopened and additional evidence taken.

It was also held that opportunity for proof of discriminatory use of blood grouping tests against Chinese alone should be accorded.

The writ was ordered sustained unless within 20 days the hearing before the Board of Special Inquiry should be reopened. 116 F. Supp. 745.

The hearings were reopened, Dr. Wiener, a competent expert produced, and his opinion received that the result of the tests precluded the establishment of the paternity claimed by appellant, Dong Wing Han. As a result, the Board found that neither appellant had established the claimed parentage, since both had testified they were blood brothers. Another appeal to the Board of Immigration Appeals followed. The appeal was dismissed. On motion of the government, Judge Murphy then dismissed the writs of habeas corpus. From that order no appeal was taken, but new habeas corpus proceedings were brought, dismissed without opinion, no proof being offered, and these appeals followed.

Appellants contend that the blood tests taken were involuntary and therefore admission in evidence of the results a violation of their rights to due process.

Their testimony at the hearing of January 8, 1953, however, established beyond question that the tests were taken voluntarily. Both testified that they made no objection of any kind to submitting to a blood test at the re-

quest of the Immigration Service, Han adding that his father asked him to go along with him.

Appellants further contend that they were denied due process by the failure of the government to produce on demand Monica, the technician who had tested the blood and assigned to the samples the groupings and types on which expert opinion as to non-paternity was based. His production, unless waived, might well be held essential to the competency of the tests as evidence. See Lee Kum Hoy v. Shaughnessy, S.D.N.Y., 115 F. Supp. 302. The tests were admitted in evidence without objection from appellants' counsel, however, which in itself was a waiver of objection to their competency.

The question was tentatively raised at the later hearing before the Special Inquiry Officer, but the request for production of Monica was not pressed.

At the hearing before the Special Inquiry Officer, at the conclusion of the direct testimony of Dr. Wiener, before beginning cross examination, counsel for appellants asked for the production as a witness of Monica. The Special Inquiry Officer requested counsel to reserve any material important to his case until he completed cross examination, unless the material was necessary to the cross examination, saying "You may reserve any motions you deem necessary. I take it you will make this request again after you are through." Counsel replied, "Thank you, and I hope, if I forget, I hope you will remind me." R. p. 63-64, record of hearing 1/26/54.

At the close of the hearing that day, adjournment was granted to February 5, 1954, for testimony of the mother and father and any other purpose counsel might deem expedient within the scope of Judge Murphy's order.

At the continued hearing February 5, counsel was asked whether he desired to present any other evidence on the issues posed by Judge Murphy's order. He answered, "Except the demand made at our last hearing for the production of certain evidence contained in the files under exclusive control and within your exclusive knowledge".

The defect in the proceedings, if such it was, due to the nonproduction of the technician Monica, must be held to have been waived. Moreover, opportunity for re-testing was offered, but declined on several occasions.

The further contention of appellants that the Board's giving conclusive weight to the blood test evidence in the face of competent testimony to the contrary is a denial of due process is without substance.

Blood test evidence is by statute competent evidence in the Courts of New York if it establishes non-paternity. N.Y. Civil Practice Act, Section 306(a),[1.] Tyler v. Costonis, 277 App. Div. 90, 97 N.Y.S. 2d 804. Under Rule 43(a) F.R.C.P.,[2.] it is therefore competent in the Courts of the United States sitting in the State of New York. While originally blood test evidence was hesitantly received by the courts, there seems no question today but that, on proper evidence in its support, it may be held conclusive under New York law. Tyler v. Constonis, supra., Fowler v.

Rizzuto, 121 N.Y.S. 2d 666, and see 1 Wigmore, Evidence, 3d Ed. 1940, Section 165(a).

Alternatively, the evidence was admissible under Rule 35 F.R.C.P., Beach v Beach, D.C. Cir., 114 F. 2d 479, and see Note of the Advisory Committee on Rules of Civil Procedure on Preliminary Draft of Proposed Amendments, May 1954, Rule 35.

The remaining ground of appeal is that the blood tests are unconstitutional as a violation of due process because applied discriminatorily to applicants solely of Chinese race.

This ground must fail for two reasons, first, that it is not established that they are applied solely to Chinese, and second, that there is sufficient evidence of unusual circumstances relating to applicants born in China during the period in question to justify a requirement of such additional evidence on the part of such applicants if available.

Such a classification based on the lack of reliable written governmental records of birth and parentage, difficulty of access to the areas from which the claimed family groups come, and long absences from the family group of the citizen father who is an identifying witness, are circumstances justifying the distinction as one not based on race or color.

No lack of due process appears in the case of these appellants, who have had ample opportunity to meet the competent evidence unfavorable to them, and have failed to do so.

Affirmed.

FOOTNOTES

1. Section 306(a) of the New York Civil Practice Act is as follows: "Wherever it shall be relevant to the prosecution or defense of an action, or wherever it shall be relevant in any proceeding pending in a court of record, the court, by order, shall direct any party to the action or proceeding, and the child of any such party and the person involved in the controversy to submit to one or more blood grouping tests, the specimens for the purpose to be collected and the tests to be made by duly qualified physicians and under such restrictions and directions, as to the court or judge shall deem proper. Whenever such test is ordered and made, the results thereof shall be receivable in evidence only where definite exclusion is established. The order for such blood grouping tests may also direct that the testimony of such experts and of the persons so examined may be taken by deposition pursuant to this article."

2. Rule 43(a) F.R.C.P. provides in part as follows: "....All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held....."

DECISION OF BOARD OF IMMIGRATION APPEALS,
DATED MAY 14, 1954, AFFIRMING EXCLUSION
ORDER

1. U.S. DEPARTMENT OF JUSTICE
Board of Immigration Appeals

May 14, 1954

Files: 0300-419637 - New York
0300-420204

In re: Wing Ott Dong and Wing Han Dong

In Exclusion Proceedings

In behalf of Appellants: Joseph J. Davidson, Esquire,
60 Wall Street
New York, NewYork

Excluded: Act of 1924 - No immigration visa
E.O. 8766 - No passport

Application: Admission as United States citizens pursuant to Section 1993, Revised Statutes.

Detention Status: Detained.

The appellants arrived at New York on April 25, 1952, by plane from Hong Kong. They sought admission as United States citizens, the sons of Dong How Lung, a native born United States citizen, and a legally resident alien mother, Chin You Yook. On July 31, 1953, this Board affirmed the excluding decision of the board of special inquiry and dismissed the appeal.

Appellants petitioned for a writ of habeas corpus. The United States District Court for the Southern District of New York held that such a writ would issue unless the hearing were reopened for the purposes specified by the court. Dong Wing Ott et al v Shaughnessy, 116 F. Supp. 745 (S.D.N.Y. December 11, 1953). In accordance with the order of the court, the hearing was reopened before a special inquiry of-

ficer who was substituted, with the consent of counsel, for the board of special inquiry, in accordance with recent statutory changes. The special inquiry officer, after hearing the evidence, reaffirmed the earlier findings and again excluded the appellants on the ground that they have not sustained the burden of establishing that they are entitled to admission to the United States as the children of a United States citizen. The case is again before us on appeal from this decision.

The United States citizenship of the alleged father has been conceded by the Immigration and Naturalization Service. The alleged mother was admitted to the United States in 1949 and is a legal (2) resident, now living with the alleged father. The alleged father has already brought to the United States and secured the admission of four alleged sons and one alleged daughter. Appellants claim to be the two youngest sons of his family of seven children.

The board of special inquiry originally found after extensive interrogation of the alleged father, the alleged mother and each of the appellants, and the special inquiry officer at the reopened hearing found that the testimony of all of them was reasonably harmonious and that they had a reasonably good knowledge of the claimed mutual family background. The findings of non-citizenship and the exclusion orders were based primarily upon the appellants' lack of positive proof of the claimed relationship and upon the results of the blood-grouping tests.

A series of blood-grouping tests were made on blood specimens of each of the appellants and on the alleged father and mother

at the United States Public Health Service Hospital at Staten Island, New York during May and June, 1952. The results of these tests were interpreted by the board of special inquiry in accordance with tables set forth in Exhibit 5 of this record, a reprint of an article entitled "Blood Grouping Tests in the New York Courts" by Alexander S. Wiener, M.D.[1] The board of special inquiry, the special inquiry officer and this Board found that the results of the blood tests were such as to exclude the possibility that these appellants could be the children of the alleged parents.

8. The procedure employed in making these tests was discussed by the court in U.S. ex rel Dong Wing Ott v Shaughnessy 116 F. Supp. 745 at p. 748. Blood specimens of the two appellants and their alleged parents were subjected to two standard blood tests, the A-B-O test and the M-N test. The A-B-O tests resulted in findings that the alleged father's blood belongs to B group and the alleged mother's blood belongs to O group. The tests disclosed that the blood of Dong Wing Ott belongs to O group and the blood of Dong Wing Han belongs to A group (Ex. 4). Referring to the accepted tables of the inheritance of blood properties[2], it was discovered that, if the tests were accurate, Dong Wing Han could not be the child of these parents, because two parents, one with B group and the other with O group blood* cannot have a child who has A blood.

The M-N tests resulted in findings that the alleged father has blood that belongs to N type (Ex. 1) and that the alleged mother has blood belonging to M type (Ex. 2). Dong Wing Ott has N type blood (Ex. 3), and Dong Wing Han has M type

blood (Ex. 4), according to (4) these tests. Using the blood test tables, it was found by the board of special inquiry, and by this Board in the past, that two parents, one with N type blood and the other with M type blood could have have a child with blood either of N or M type, and therefore both appellants were excluded on the basis of the M-N tests also. Following the first tests and upon the discovery that they demonstrated incompatibility of blood between appellants and the alleged parents, the United States Public Health Service requested appellants in a letter dated April 11, 1952, to submit to a second run of blood tests. In all of the cases we have seen, when blood tests performed by the United States Public Health Laboratory at Staten Island demonstrated incompatability of blood between an applicant for admission and his claiming parents, the parties to the tests were requested to submit to a second series of tests in order to insure complete accuracy. In the instant case the alleged parents and the appellants refused at that time and have continued to refuse to submit to a second series of tests.

When appellants were before the United States District Court on their application for a writ of habeas corpus, the court declared that as a matter of notice and opportunity for hearing on the merits, there was no substantial objection to the use of Dr. Wiener's treatise in interpreting the results of the blood tests. The court held, however, that the failure of the Immigration and Naturalization Service to produce Dr. Wiener, or some similar expert conveniently available, to testify with regard to blood tests and to draw medical conclusions from the blood tests already in evidence is a defect sufficient to justify sustaining the writ. The court

also found that the administrative rejection of relators' offer of proof of discrimination in the use of blood grouping tests against Chinese in exclusion proceedings was error and that the hearing before the board of special inquiry should offer an opportunity both to appellants and to the Immigration Service to introduce evidence relating to the alleged discriminatory use of such tests.

It is the belief of this Board that the errors in and omissions from the record indicated by the court have been cured by the reopened hearing, to the extent that it is possible, (1) in view of the refusal of appellants' counsel to submit appellants to additional blood tests conducted by any authority, and(2) in view of what seems tous to be the impropriety of counsel's request that the Immigration and Naturalization Service open a number of files for his inspection, in the hope that he might demonstrate that the Public Health Service in the past has made a number of errors in conducting blood tests and for other purposes.

5. In accordance with the court's instruction, the Immigration and Naturalization Service called Dr. Alexander Wiener, the author of Blood Grouping Tests in the New York Courts (Ex. 5), and other publications. Dr. Wiener was qualified as an expert, and counsel did not challenge his qualifications. He testified as to the history and development of blood tests and as to their accuracy and efficacy at this time. He stated that there has been no change in the conclusions set forth in the article written by him in 1936 (Ex. 5), and that all experience since that time has been consistent with views expressed in that article. He declared that with more experience

the earlier conclusions have been strengthened. There was placed in evidence as Ex. R-2, a reprint of a newer article, Medicolegal Application of Blood Grouping Tests, by Dr. Wiener, Dr. Israel Davidsohn and Dr. Philip Levine, reprinted from Journal of American Medical Association, June 14, 1952. This review of the subject repeats and amplifies much of the material contained in Exhibit 5.

Dr. Wiener testified that the A-B-O, M-N and Rh blood systems are completely separate, independent, unrelated blood group systems, that there are a number of others (described in Ex. R-2), but that the less known systems have not yet any practical medicolegal significance. He testified that it is immaterial whether parentage is disproved by one, two or all three blood tests, that any of the three tests is equally valid in disproving parentage. Some of his testimony was general and did not relate specifically to the facts in this case but was given as background information. He discussed techniques, theory and Rh tests, which were not used in this case.

Dr. Wiener testified that an ordinary hospital technician, qualified to perform A-B-O tests for transfusion purposes is competent to perform A-B-O tests for all purposes. He testified that he has no reason to doubt that the United States Public Health Service technician who made the blood grouping tests in this case is competent to determine A-B-O classifications. He does doubt that this same technician is competent to perform M-N tests, because an M-N test to be reliable should be performed only by persons who do those tests frequently and regularly. A further reason for believ-

ing that the M-N tests in the present case may not be reliable, he testified, is that on two occasions he has disagreed with M-N tests performed by the UnitedStates Public Health Service. Dr. Wiener testified that the only discrepancies or errors he has found in the United States Public Health Service tests have involved M-N tests and never A-B-O tests.

6. With regard to the exhibits in the present case prepared by the United States Public Health Service, Dr. Wiener testified that neither completeness nor crudity in a report form is any gauge of the accuracy of the test results reported, that the only reason he would question the test results reported in Exhibits 1-4 of this record are that he notes a discrepancy between the blood of the alleged parents and the children, and he would want to examine further into such a situation.

Dr. Wiener stated that he believed that Dr. Cameron, Chief of the Department of Pathology of the United States Public Health Service Hospital at Staten Island, is qualified to perform A-B-O tests, and therefore his technicians whom he trained would necessarily be qualified. He stated that the fact that the person makes an error in an M-N test does not necessarily shake confidence in his A-B-O tests, that errors in M-N tests are to be anticipated, because of the nature of the tests. He stated that there is hardly any mechanical difficulty in making A-B-O tests, that potent serums for this test are readily available on the open market and, if produced by one of the recognized serum producing firms, are certified by the National Institutes of Health.

Dr. Wiener said (pp. 88,89) that for the purposes of testify-

ing in legal proceedings he preferred not to rely on the conclusions drawn from tests made by other persons, but preferred to make his own tests. He stated, "Naturally, if you testify you want to say you did everything with your own hands, you saw everything. However, If I were compelled to offer an opinion in a case like Dr. Sussman, I would take his report on face value." Dr. Wiener's testimony provided the answers to several questions that have been asked by representatives of applicants in the blood grouping cases. Counsel has contended on a number of occasions that subjecting appellants to blood tests is dangerous to their health, that there is a possibility of infection. Dr. Wiener was questions by counsel on this subject (pp. 50, 73.-74) and testified that the possibility of infection is infinitesimal, that theoretically there is always a possibility of infection when the skin is broken, but that he had never heard of a case of infection, even in the Army where millions of blood specimens were taken for blood testing purposes. He said that he alone must have been responsible for nearly half a million punctures and that he considers that infection "is unheard of" (p. 74).

7. In several of the cases involving blood testing the question has arisen as to whether or not Asiatics have the same kinds of blood as Caucasians and Negroids, because most of the testing has been done among these latter races. Counsel asked Dr. Wiener whether he had done research among the Chinese and if the blood of the Chinese is different from that of any other race. Dr. Wiener testified (p. 81) that he published an article on the distribution of blood groups

in the Chinese people with a Dr. Yi who was in New York during the war. There was a Chinese blood bank there, and Dr. Yi took specimens, and Dr. Wiener typed the specimens. He said that the types are identical but that the frequencies of the types are different. That is, the percentages or distributions of each type differ, but otherwise there is no difference.

Several doctors testifying in these cases have suggested that if a competent authority is not available in the locality, blood is transportable and durable, and may be frozen and shipped to another city where there is an expert in blood testing.

The judges of the Court of Special Sessions, after consultation with the New York Academy of Medicine, approved a panel of six doctors, including Dr. Wiener, to conduct blood tests in paternity proceedings before the court. The Immigration and Naturalization Service commenced to use this panel after the time of the original hearing in this case. Dr. Leon Sussman, who operates a private blood(8)laboratory in New York City testified in Matter of Lee Kum Hoy, etc. 0300-423253-4-5. He was called by counsel for appellants in that case to testify as an expert witness. Dr. Sussman testified that he is also a member of the selected panel, that when the Immigration and Naturalization Service desires a blood test conducted, the applicant is now presented with the panel of qualified experts, that the applicant selects one name from that panel and that doctor conducts the blood test. The New York Office of the Immigration and Naturalization Service at first attempted to permit the applicant to choose his own

doctor, since he was paying the fee. Finding that some doctors were not qualified and that the questions of fraud and overcharging arose, the procedure outlined by Dr. Wiener and Dr. Sussman was agreed upon.

Dr. Wiener testified that he, himself, has performed blood tests in approximately 2,000 court cases and 4,000 family studies, that never was there any doubt as to maternity, and the studies never once showed non-maternity, but they frequently showed non-paternity (p. 47).

At the reopened hearing held on January 26, 1954, counsel submitted a report of a blood test, allegedly performed by Dr. Wiener on the blood of the alleged parents on September 24, 1952. This report was never before placed in evidence in this record, and it never was presented to us any of the three times the case was before this Board. According to the tests performed by Dr. Wiener, the alleged father has the same blood shown by the United States Public Health Service tests (BN) but the alleged mother has blood belonging to the M-N group. Therefore, Dong Wing Ott with blood belonging to N type could possibly be the child of this marriage. (See footnote 2. N father and M-n mother can have children with blood of N or M-N type, but not of M type). Dong Wing Han with blood belonging to M type still could not be the child of the claiming parents.

There was some discussion in the reopened hearing as to whether or not the alleged mother is the same person as the woman whose blood was tested by Dr. Wiener. It is our conclusion that the record supports a finding that she is the

same person, in spite of the confusion of names and the smeared fingerprints on the blood testing report, and in spite of a statement made by counsel in his brief of December 9, 1952, as follows: "Dr. Wiener was not called as a witness and of course no opportunity was afforded to cross-examine him, nor is there any evidence that Dr. Wiener has ever heard of this case or of the tests made of the blood of these aliens." (Emphasis supplied)

9. Mr. Davidson has been counsel for these aliens since the time of their first hearing before a board of special inquiry at Ellis Island on July 15, 1952, and it seems he should have known if they had gone to Dr. Wiener in September, 1952, for independent tests. The special inquiry officer did not ask counsel or the alleged parents where the report of Dr. Wiener's blood tests has been since September 1952. There is no explanation of how the alleged parents happened to go to Dr. Wiener's laboratory, of how the reports came into counsel's hands at this late stage of the litigation, or why it has not been presented to this Board or to the U.S. District Court for consideration before this.

Accepting the tests of Dr. Wiener as conclusive of the mother's blood type, and as corrective of the Public Health Service finding as to her blood type, the blood tests do not exclude appellant Dong Wing Ott as a possible child of the alleged parents. Dong Wing Han cannot be their child, because both the A-B-O and the M-N tests demonstrate incompatibility of blood between that appellant and the alleged parents. However, Ott's claim is entirely dependent upon the testimony of the other three members of the alleged family

group, and since they are discredited as witnesses because of the blood tests which prove that Han is not their child, Dong Wing Ott also must be excluded.

Counsel contends that there is no statutory authorization for physical examination of aliens by Government doctors. If indeed statutory authorization is needed for physical examinations of foreign born claimants to citizenship arriving in the United States for the first time (and blood typing is part of physical examination, Beach v Beach infra), it is provided by Section 234 of the Immigration and Nationality Act of 1952, 8 USC 1224, formerly 8 USC 152, Section 16 of the Immigration Act of 1917, as amended [5], the Public (10) Health Service Act, 42 USC 252 [6], and Public Health Service Regulations 42 CFR 34.1 [7]. There are other statutes and regulations providing for medical and surgical treatment and dental care for aliens and "persons when detained". [8] The fact that these appellants claim to be citizens and not aliens does not deprive the Service of the power and duty to give care and treatment and to conduct the necessary examinations under these laws and regulations. Until a determination has been made as to whether they are citizens or aliens, it may be administratively practical and a necessary precaution for the health and protection of all detainees that they be accorded the same treatment.

Since counsel for appellants hasrefused to permit additional blood tests by any authority, the United States District Court, if this matter comes before it again, may order new blood grouping tests without additional statory authority. This action was taken by the court in Beach v Beach, 114 F

2d 479 (C.A.D.C., 1940), and in Ly Shew ex rel Ly Moon v Acheson, No. 30159 (this order unrep. but (11) later proceedings rep. 110 F. Supp. 50, S.D. Cal., 1953) and Fong Sik Leung v Acheson, Unrep. No. 30318 [9].

An important recent case involving blood testing (not yet decided when the present controversy was last before us) is Wong Yoke Sing v Dulles, 116 F Supp. 9 (E.D.N.Y. 1953) wherein the plaintiff had applied to the Department of State for a statutory certificate of identity to enable him to travel from Hong Kong to the United States to testify in his action for a declaratory judgment under Sec. 503 of the Immigration and Nationality Act of 1952. His application was denied by the American Consul, and he appealed to the Secretary of State. The Secretary offered to issue the certificate if the plaintiff's alleged mother would submit to a blood test, and if the test showed a possibility of a physical relationship between the mother and the plaintiff son. The alleged mother failed to submit to the blood test, but in spite of this failure, the plaintiff applied to the court for an order directing the issuance of the certificate of identity. The court held that the plaintiff should be given another opportunity to obtain a blood test of the alleged mother and set the period of 90 days for that purpose, during which time the defendant administrator was instructed to render plaintiff all possible assistance. The court further ordered that at the end of this period the defendant should issue an order either denying (12) or granting thecertificate of identity and stating his reasons therefor. There was no discussion of the propriety of the request by the Secretary of State

that blood test evidence be offered to support the request for the travel document. The court apparently accepted without question the value of blood testing evidence.

What inference may be drawn from appellants' refusal to submit to blood tests by their own doctor?

In Wong You Henn v Brownell, 207 F. 2d 227 (D.C. Cir. 1953) the plaintiff urged as error an unfavorable inference drawn by the trial judge from plaintiff's failure to take certain depositions in Hong Kong. The trial judge had suggested the value of such depositions from persons who had custody of plaintiff from an early age. The plaintiff declined to take such depositions, although the trial court offered a suitable continuance for that purpose. The appellate court held that the unfavorable inference drawn by the trial judge was unavoidable andproper.

The basic rule with regard to the nonproduction of evidence is stated in Wigmore, Vol. 2, Par. 285, as follows:

> The failure to bring before the tribunal some circumstance, document or witness, when either theparty himself or his opponent claims that the facts would thereby be elucidated, serves toindicate, as the most natural inference, that the party fears to do so, andthis fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the

party's fear of exposure. But the propriety of such an inference in general is not doubted.

> The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause. Ever since the case of the Chimney-sweeper's Jewel, this has been a recognized principle. 1722 Armory v Delamirie, 1 Strange 505. (Emphasis supplied)

13. Wigmore then reviews a great number of cases expounding this principle, both English and American, from 1705 to the present day. A typical case is Wesson v U.S., 172 F 2d 931 (C.A. 8, 1949) in which thecourt said:

> The failure of the government, under the circumstances disclosed, to call these witnesses justifies, if it does not compel, the inference that their testimony would have been against the government (citing cases).

Again in Meidhoefer v Automobile Insurance Co. of Hartford, Conn., 182 F. 2d 269 (C.A. 7, 1950), the presumption was stated:

> The rule is well established, and we think it is of significance in the instant situation, that the failure to produce evidence, which under the circumstances would be expected, gives rise to a presumption against the party failing to produce it. (Emphasis supplied)

In Chicago, M., St. P. & P.R. Co. v Slowik, 184 F. 2d 920 the court declared that the failure of the plaintiff to call the driver of the car, who was his brother and was available as a witness, "warrants, if indeed it does not compel, the inference that his testimony would not have tended to establish plaintiff's contention, but that his testimony ifpresented would have been adverse to the plaintiff."

This rule is perhaps most widely applied against the bankrupt in bankruptcy proceedings, vast numbers of cases holding that he is in the best position to tell what happened to missing assets, and if he fails properly to inform the court, unfavorable inferences may be drawn. The United States Supreme Court recognized the presumption in United States v Di Re, 332 U.S. 581, 68 Sup. 222, 92 L. ed. 210 (1948) and in Maggio v Zeitz, 333 U.S. 56, 92 L. ed. 476.

Since it was exclusively within the power of appellants to offer additional blood test evidence, the best possible refutation of the Government's blood test evidence, and since they have refused to do so, it seems reasonable to draw the inference that they know or fear that such evidence would be unfavorable to them.

Both in this case and in U.S. ex rel. Lee Kum Hoy et al., v Shaughnessy, 115 F. Supp. 302 (S.D.N.Y. 1953), a companion case to the present one and simultaneously before the same tribunal, the court specifically (14) refused to rule on the contention that requiring blood grouping tests of Chinese claimants to derivative citizenship constitutes racial discrimination by the Immigration and Naturalization Service. The courts stated that the facts with regard to the alleged practice were not sufficient.y before them at that time. The court's order of January 6, 1954 in this case required that the reopened hearing before the board of special inquiry offer "opportunity to both relators and the Department of Justice of the United States to introduce evidence of alleged discriminatory use of blood grouping tests in accordance with the opinion of the court."

At the reopened hearing counsel for appellants made no offer of proof to support the contention that the blood testing of Chinese claimants to derivative citizenship constitutes racial discrimination, other than a request that the special inquiry officer produce the files in seven cases, for which counsel had names and some file numbers. All the cases involved Chinese applicants for admission to the United States, and counsel contended that some of the files "might tend to show discrimination" (p. 91). He stated that it was his purpose to demonstrate that the Immigration Service had limited blood tests specifically to Chinese applicants, and that in perhaps two of the cases he believed that blood tests were demanded by the Immigration Service, in spite of the fact that the Chinese applicants involved in those cases possessed birth certificates. He believed further that at least some of these files would show that errors had been committed by the United States Public Health Service in conducting blood tests.

The special inquiry officer refused counsel's request on the grounds that counsel was engaged in a fishing expedition, and that all immigration files have always been considered to be confidential. It was proper for the special inquiry officer to refuse to permit counsel to search files which have no relation to the present matter. Files of the Immigration Service are not available for general examination by unauthorized persons.

There was no other evidence as to the alleged racial discrimination offered by either appellants or by the Immigration Service. It is our belief that the issue is not properly in this case. When a case involves a question of whether or not

members of a minority group in the United States shall vote or go to certain schools or be employed in certain jobs, and the allegation is that they are being prevented from voting, schooling or employment because of their race, then racial discrimination is an issue. This is not such a case. Here is only (15) one question, that of identity - "Is this child the offspring of the claimed father?" There is no question of race involved. In disputed paternity proceedings the value of blood testing was quickly recognized, because it had been so difficult to disprove a false charge of paternity. The same is true in the present case - it is more difficult to disprove a false claim of relationship, than it is to prove a true claim.

We cannot hold that merely because claimants are non-white it is not necessary for them to offer adequate proof to substantiate their claims of citizenship. Claimants born in countries other than China are not permitted to establish citizenship without any proof except their claims. In U.S. ex rel Rongetti v Neelly, 207 F 2d 281 (C.A. 7, 1953), the court stated that where plaintiff was born in Italy and came to the United States from that country, the burden of proof to establish his United States citizenship was upon him, and that he had not sustained the burden by a bare claim of citizenship unsubstantiated by any evidence. In U.S. ex rel Barilla v Uhl, 27 F Supp. 746, (S.D. N.Y. 1939), affd., 108 F 2d 1021, the court found that the precedents require "some substantial evidence in support of their claims of citizenship."

A quick, scientifically accurate, simple and inexpensive method

to assist in screening applicants should be as valuable and desirable from the standpoint of the applicants as from the standpoint of this Government. The courts as well as the immigration authorities dislike the "discrepancy in testimony" technique. The cases which have so far arisen have involved Chinese persons, because of their historic custom ofleaving their children in China to be raised and educated before bringing them to the United States.[10] Most of the tests were made at the request of the American Consul in Hong Kong prior to documentation of claimants who wished to proceed to the United States. The tests were made of mothers and children in Hong Kong and fathers in the United States. The results of the tests were compared, and a determination so far as possible[11] of compatibility or incompatibility made before theclaimant children began their expensive trips to the United States. Here again an early determination is of even greater value to the applicant than to the Government.

16. Counsel contends that in atleast two cases where they possessed birth certificates, Chinese applicants have been required to submit to blood tests. The applicants in the present case were not in possession of birth certificates, so the question should not arise here. However, it should be observed that China is still a country almost without vital statistics and, Chinese birth certificates, so far as we know without exception, have been certificates issued many years after the alleged date of birth. It has been held that a birth certificate not filed contemporaneously with the birth of the person named therein is not entitled to be given the weight of a birth certificate executed at the time

of birth. Ex Parte Wilson, 49 F. 2d 468 (N.D. Wash., 1930); Nagle v Dong Wing, 29 F. 2d 438 (C.A. 9, 1928). We followed those precedents in Matter of Wong Fon, 7181968 (October 25, 1949), which involved a birth certificate issued by the State of California 49 years after the alleged date of the birth of the applicant.

To recapitulate: The burden is on the appellants to establish their citizenship. The appellants have failed to sustain the burden of proving the necessary relationship. On the other hand, the Government has introduced persuasive proof that the claimed relationship does not exist between the alleged parents and Dong Wing Han. There were procedural errors in the original hearing which led the UnitedStates District Court to hold that appellants were denied due process of law. We believe that those errors have been cured in the reopened hearings accorded appellants by the Government in obedience to the order of the court. Appellants were granted adequate opportunity to cross examine Dr. Wiener and to introduce expert testimony in their own behalf, if they wished to do so. A-B-O tests conducted by Government technicians disproved the claimed family relationship with regard to one appellant. Counsel's objections are frivolous in the face of his continued refusal to permit additional blood tests conducted by technicians of his own choosing. Nonproduction of evidence within the power of one party to produce, permits the inference that its tenor is unfavorable. Since new or additional blood test evidence is in the hands of appellants, they cannot properly complain that it is not in the record. Although the blood tests do not demonstrate incompatibility of blood between

Dong Wing Ott and the alleged parents, his claim is dependent entirely upon the testimony of the other three members of the alleged family group, and they are discredited as witnesses by their own demonstrably false testimony. Therefore, Dong Wing Ott also must be excluded.

It is our conclusion that the appellants have not sustained the burden of proving the claimed relationship to the alleged parents. The appeal will be dismissed.

Order: It is ordered that the appeal be dismissed.

Thos. S. Finucane

Chairman

FOOTNOTES

1. Frequently in the course of these cases the tables have been referred to by the courts and others as "Dr. Wiener's Tables." Perhaps this has been misleading, because these same tables appear in all literature on the subject of blood testing. (The inheritance of blood properties follows and has been shown to be consistent with the general laws of inheritance established by the science of genetics.) Dr. Wiener's pamphlet containing the tables, which was used as an exhibit in these cases by the Immigration Service, was used, we assume, rather than some other exposition on the subject, simply because it happened to be available in convenient reprint form, and because of the prominence of the author, a pioneer in this field. The same tables are set forth in 163 A.L.R. 923, in State v. Damm, 62 S.D. 128, 251 N.W. 7, in "Medicolegal Application of Blood Grouping Tests," by Davidsohn, Levine and Wiener, now Ex. R-2 in this record, published in Journal of American Medical Association, June 14, 1952, Vol. 149, pp. 699-706. For historical background of these tests see this Board's opinion in Matter of L.F.F. Int. Dec. 430, now part of this record.

2.

Parents' blood groups	Groups of children not possible
A and A	B, or AB
A and B	None (i.e.,all types possible)
A and AB	O
A and O	B, or AB
B and B	A, or AB
*B and O	A, or AB
AB and B	O
AB and AB	O
AB and O	AB, or O
O and O	A, B, or AB

Blood Type of Parents	Types of Children not possible
M and M	N, or MN
*M and N	M, or N*
M and MN	N
N and N	M, or MN
*N and MN	M
MN and MN	None (all types possible)

3. The usual distribution is said to be as follows: Group O includes approximately 45% of the population; group A includes approximately 42% of the population; group B includes approximately 10% of the population, and Group AB includes approximately 3% of the population. 163 A.L.R. 923.

FOOTNOTES (Cont'd)

4. The outstanding line of cases upholding blood test evidence is from the New York Courts. Dellaria v Dellaria (1944), 183 Misc. 832, 52 N.Y.S. 2d 607. Schulze v Schulze 35 N.Y.S. 2d 282 (1942). D'Agostino v D'Agostino , 173 Misc. 312, 17 N.Y.S. 2d 905 (1940). Cuneo v Cuneo, 96 N.Y.S. 2d 899, 198 Misc. 240 (1950). Scalone v Scalone, 98 N.Y.S. 2d 167, 199 Misc. Rep. 210 (1950). Saks v Saks, 189 Misc. 667, 71 N.Y.S. 2d 797 (1947). Clark v Ryssdorph, 118 N.Y.S. 2d 103 (Sup. Ct. App. Div. 1952). Wong Yoke Sing v Dulles, 116 F. S UPP. ((E.D.N.Y.) 1953, recently recognized the value of blood testing evidence.

5. 8USC 1224:. . .Aliens (including alien crewman) arriving at ports of the United States shall be examined by at least one such medical officeror civil surgeon under such administrative regulations as the Attorney General may prescribe, and under medical regulations prepared by the Surgeon General of the United States Public Health Service.

6. 42 USC 252: The Surgeon General shall provide for the making, at places within the United States or in other countries, such physical andmental examinations of aliens as are required by the immigration laws, subject to administrative regulations prescribed by the Attorney General and medical regulations prescribed by the Surgeon General with the approval of the Administrator.

7. Public Health Service Regulations, 42 CFR 34.1: The provision of this part shall apply to (a) the medical examination and reexamination of aliens presented therefor to the Public Health Service upon the arrival of such aliens at a port of entry, or upon an application for a visa at a foreign consulate of the United States, and (b) the medical and other care, and burial, of aliens admitted to Public Health Service stations and hospitals at the request of the Immigration Service.

8. 42 USC 249
42 CFR 34.11 (a).

9. In ordering blood grouping tests made, the court stated: The defendant having moved, pursuant to Rule 35, of the Federal Rules of Civil Procedure, for an order directing the plaintiff herein and his alleged father to submit to a physical examination, including blood grouping tests, and it appearing to the court that such tests, if made under proper conditions by persons competent to make and evaluate such tests, may have probative value to disprove, but not to prove paternity and thus may be admissible on a trial on the merits if the trial court should find that the question of paternity is legally an issue, and it further appearing to the court that such blood grouping tests may properly be ordered under said Rule 35 (See Beach v. Beach), it

FOOTNOTES (Cont'd)

is by the court ordered that the defendant's said motion for an order directing the plaintiff herein and his alleged father to submit to a physical examination, including blood grouping tests, be and the same hereby is granted, and the defendant is directed to prepare an order in conformance with the provisions of said Rule 35. Dated August 27, 1952. Michael J. Roche, Chief Justice United States District Judge.

10. For a comprehensive discussion of the overall problem see: Mar Gong v McGranery, 109 F. Supp. 821 (N.D. Calif. 1952) and Ly Shew v Acheson, 110 F. Suppl. 50 (N.D. Calif. 1953)

11. In the cases that have involved blood grouping tests that have come before this Board the only tests that have been performed in Hong Kong have been A-B-O Tests. The technicians there have not attempted the more difficult M-N and Rh tests.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No 144

DONG WING OTT AND DONG WING HAN,
PETITIONERS

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE NEW YORK DISTRICT

ON MOTION TO PROCEED ON TYPEWRITTEN PAPERS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A.) is reported at 220 F. 2d 537.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 1955 (G. A. 141).[1] A peti-

[1] The appendix to petitioners' brief in the Court of Appeals is designated as "P. A."; the government's appendix is designated as "G. A." Both are on file with the Clerk of this Court.

tion for rehearing was denied on April 13, 1955 (G. A. 161, 163, 165). The petition for a writ of certiorari was filed on June 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In an exclusion proceeding involving petitioners' claims to citizenship as the alleged Chinese-born sons of a native-born father of Chinese origin, the Government introduced evidence of blood tests which negated the possibility of the claimed relationship. The questions presented are:

1. Whether the taking of the blood for the tests was a denial of due process or an unreasonable search and seizure.

2. Whether the blood tests could properly be accepted as proof of non-paternity sufficient to overcome petitioners' testimony.

3. Whether there was a denial of due process in receiving the reports in evidence with the testimony of the supervising doctor without testimony by the technician who took them, and in drawing an unfavorable inference from petitioners' refusal to submit to a second test offered by the Government.

4. Whether the use of blood tests on persons of Chinese origin is discriminatory.

STATEMENT

Petitioners, foreign-born persons who claim to be blood brothers, sought admission to the

United States pursuant to Section 1993, Revised Statutes, as the sons of a native-born American father of Chinese origin. By a writ of habeas corpus (G. A. 9) petitioners tested the validity of an administration determination that their claims to citizenship had not been established. The District Court for the Southern District of New York dismissed the writ (P. A. 1) and its order was affirmed on appeal (G. A. 141).

Petitioners arrived in the United States by plane from Hong Kong on April 25, 1952, at the port of the city of New York (P. A. 1). Numerous hearings and appeals have been accorded the petitioners by Boards of Special Inquiry and a Special Inquiry Officer (G. A. 15, 27, 39, 42, 97), the Board of Immigration Appeals (G. A. 40, 43, 118), and the District Court (G. A. 80). The following pertinent facts appear from these proceedings:

The only testimony adduced by petitioners in proof of their claim to citizenship was that of themselves and their alleged parents which was found to be reasonably harmonious as to family background and history (G. A. 29). Petitioners and their purported parents all claimed that Ott and Han were blood brothers (G. A. 114).

The Government introduced into evidence without objection (G. A. 21) a report on blood tests made of petitioners and their parents by the United States Public Health Service. These

tests, which were taken when petitioners were in custody in Ellis Island, precluded the possibility of the claimed relationship (G. A. 29). Petitioners testified that they made no objections to the taking of their blood (see G. A. 145; P. A. 82), but that they did not know for what purpose they had been taken to the doctor's office (P. A. 10). Han added that his father asked him to go along with him. (See G. A. 145.)

Dr. Cameron, in charge of the laboratory where the tests were made, testified as to the methods used and the competence of the technician who took the tests (P. A. 20–27). Counsel for petitioners made a request for attendance of the technician, but was asked to delay his request. Perhaps because of inadvertence he did not again make it (G. A. 97).

Dr. Weiner, an expert on blood grouping tests, testified on an hypothetical basis that in view of the results of the blood tests of petitioners and their alleged parents, the claimed relationship could not exist (P. A. 64–66). He also testified that a test he made on the alleged mother differed from the result reached by the United States Public Health Service and that Ott could be her child by the alleged father (P. A. 86).

On advice of counsel, petitioners declined to submit to additional blood tests offered by the Government to check against possibility of error in the first set of tests (G. A. 97; P. A. 29, 81).

The refusal was grounded upon an allegation that the blood tests were discriminatory because used only on those of Chinese origin. Counsel attempted to subpoena a government official from the Immigration Service (P. A. 11) and to put on the stand a member of the Board of Special Inquiry (P. A. 9) to testify on the point of discrimination. He tried also to obtain immigration files in seven other cases which he said "might tend to show discrimination" (P. A. 76). These requests were denied (P. A. 78, 8, 9). He also introduced into evidence a memorandum authorizing blood grouping tests at the request of the American consul in Hong Kong of certain United States citizens of Chinese descent who are claimed as parents of foreign born applicants for United States passports (P. A. 18).

On the basis of the foregoing evidence, the Board of Special Inquiry (G. A. 42) and the Special Inquiry Officer (G. A. 100; P. A. 82), who was later substituted for the Board with the consent of petitioners, ruled that petitioners had not established their claim to citizenship. Petitioners were therefore ordered excluded. It was noted, on the assumption that the blood test run by Dr. Weiner was corrective of that made by the Public Health Service, that Ott's claim of Han as his blood brother precluded Ott's claim of parentage because the blood tests showed that Han could not be the son of the alleged parents both were

claiming (P. A. 83). The Board of Immigration Appeals affirmed the order of exclusion (G. A. 118).

ARGUMENT

1. Petitioners contend (Pet. 2, 11) that the taking of the blood tests amounts to an involuntary search and seizure in violation of their constitutional rights. We submit, however, that, such a test is in essence no different from the taking of fingerprints and may properly be used as a means of identification. The prick of a finger is not "conduct that shocks the conscience," as forced stomach pumping was found to be by this Court in *Rochin* v. *California,* 342 U. S. 165, 172, or a method "revolting to the sense of justice," as a tortured confession was held to be in *Brown* v. *Mississippi,* 297 U. S. 278, 286. Although dealing with state prosecutions and not administrative proceedings in the *Rochin* case at page 174, this Court specifically held that it did not bring into question modern methods and devices that did not "legalize force so brutal and so offensive to human dignity in securing evidence" as it found forced stomach-pumping to be. Blood-grouping tests have become established as a scientific contribution to judicial determinations of disputed paternity issues. The pricking of a finger to obtain the necessary sample is neither brutal nor offensive.

This Court had indicated, tacitly by adopting Rule 35 of the Rules of Civil Procedure,[2] and affirmatively in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 11, citing *Union Pacific Railway Co.* v. *Botsford*, 141 U. S. 250, that statutes authorizing physical examinations are constitutionally valid. Blood tests have been held to be a part of the physical examination which federal courts may order under Rule 35. *Beach* v. *Beach*, 114 F. 2d 479 (C. A. D. C.). In this case, there was no need to resort to Rule 35 because Section 234 of the Immigration and Nationality Act (8 U. S. C. 1224)[3] in itself provides statutory authorization for a general physical examination to be taken of aliens entering this country. The fact that such tests can be ordered by a court does, however, indicate that the taking of the test under certain circumstances is not a violation of constitutional rights. The taking of the test in this case, pursuant to the general statutory authorization for

[2] "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

[3] "* * * Aliens (including alien crewmen) arriving at ports of the United States shall be examined by at least one such medical officer or civil surgeon under such administrative regulations as the Attorney General may prescribe, and under medical regulations prepared by the Surgeon General of the United States Public Health Service."

physical examination, was also not a violation of constitutional rights.

It is thus unnecessary to consider petitioners' challenge (Pet. 3, 11) to the finding by the Court of Appeals that submission to the tests was voluntary. There is no doubt that petitioners did allow the test to be made, but it is not clear from the record that they knew what they were doing. We do not rely upon the finding of voluntariness—except that it indicates that neither force nor deception was used on petitioners—but upon the fact that the tests were properly part of an authorized physical examination.

2. Contrary to petitioners' contentions (Pet. 3, 10), the immigration service could properly rely on blood grouping tests to overcome interested oral testimony in petitioners' behalf. By judicial decision and by statute, the law has accepted the use of blood-group composition, when supported by the testimony of a qualified expert, to negative paternity. For a collection of statutes, decisions and articles on the subject see Volume 1, Wigmore on *Evidence* (3rd ed.), Section 165a, and also the Board of Immigration Appeals' decision in the case of *Lee Fay Fan*, Feb. 25, 1953, found in the government's appendix below (G. A. 53–79).

The asserted conflict (Pet. 10) between the decision below and that of the Seventh Circuit in *Lee Wing Hong, et al.* v. *Dulles,* 214 F. 2d 753, does not exist. The Seventh Circuit in the *Lee Wing Hong* case (at p. 759) stated that the district

court was not required to give conclusive effect to the blood tests, however valuable or important such tests might be. The Second Circuit in this case merely says that the Board of Immigration Appeals could accept the blood-test evidence as conclusive without violating due process. It does not hold that it was required to do so. There is no area of disagreement between the two circuits.

3. Petitioners' objection to the introduction into evidence of the report of the blood tests without the supporting testimony of the technician who took them (see Pet. 4, 11–12) must be deemed waived since their counsel did not object to their introduction into evidence (G. A. 21) nor did he object subsequently. Furthermore, Dr. Cameron, in charge of the laboratory where the tests were made and under whose supervision the technician worked, attested to the technician's competence and to the methods used in running the tests (P. A. 20–27). Petitioners' concern over the accuracy of the reported tests at this time (Pet. 5) seems artificial in view of their refusal to submit to a second test offered by the Government (G. A. 97; P. A. 29, 81).

The unfavorable inference (see Pet. 4–5, 12) drawn by the Board of Immigration Appeals in its decision of May 14, 1954 (G. A. 133) from petitioners' refusals to submit to a second set of blood tests was proper. "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is

unfavorable to the party's cause." 2 Wigmore, *Evidence* (3rd ed.), Section 285. This principle has its basis in the common law and has been consistently followed in our courts.[4] This Court recognized the presumption in *United States* v. *Di Re*, 332 U. S. 581, 593. Petitioners' explanation that their refusal was based on the alleged fact that the blood tests were given only to those of Chinese origin is not convincing. Having already had one test, petitioners had nothing to lose by taking the second test, unless, as was inferred by the Board of Immigration Appeals, they feared the results would confirm the first set of tests.

4. Petitioners' claim (Pet. 2–3, 11, 12–13) that the blood tests are discriminatorily used only on those of Chinese origin is not established in the record. However, we do not rely on the absence of proof alone since petitioners did make a fruitless attempt to obtain the testimony of immigration officials (P. A. 9, 11).[5]

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[4] See *Wong You Henn* v. *Brownell*, 207 F. 2d 226, 227 (C. A. D. C.); *Chicago, M., St. P. & P. R. Co.* v. *Slowik*, 184 F. 2d 920, 924 (C. A. 8); *Neidhoefer* v. *Automobile Insurance Company of Hartford, Conn.*, 182 F. 2d 269, 271 (C. A. 7); *Wesson* v. *United States*, 172 F. 2d 931, 936 (C. A. 8); *Hyun* v. *Landon*, 219 F. 2d 404, 409 (C. A. 9).

[5] The denial of the petitioners' requests was not without reason. They had asked (1) to take the testimony of the special inquiry officer who was conducting the proceeding, and (2) of any official to testify regarding the "rules and regulations" of the Service, which did not, of course, require proof.

The use of the blood tests in connection with claimants from China is apt to occur more frequently than with other groups because issues of identity arise more often with respect to Chinese. This stems from the Chinese custom of leaving their children in China to be raised during which time the alleged father does not see them; the fact that birth records issued at the time of birth are generally unknown in China; and the fact that the government is unable to investigate the alleged family relationships in the remote areas of the interior of China where most of such children are claimed to have been born. *Lue Chow Kon* v. *Brownell,* 220 F. 2d 187, 189 (C. A. 2). The simple fact that the tests may have been particularly used with respect to claimants from China would not, even if established, result in a denial of due process by reason of discrimination. The tests will undoubtedly be used on any claimant of any racial origin when paternity is in doubt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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